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September 22, 1998

Ms. Kathryn C. Brown
Chief, Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
5th Floor
Washington, D.C. 20554

Re: Notice of Permitted Ex Parte Contact; Submission of Additional Materials For The Record (CC Dkt. Nos. 96-98 and 98-79; CCB/CPD 97-30)

Dear Ms. Brown:

I am submitting a copy of this letter to the Commission Secretary to memorialize the fact that I met with you and Ms Tamara Preiss of your staff on Friday, September 18, 1998, on behalf of ALEC, Inc. to discuss the question of terminating compensation payments for calls that ILEC end users make to ISPs served by a CLEC. A copy of this letter is being filed in Common Carrier Docket No. 96-98 (Local Interconnection), Common Carrier Bureau file DA 97-1399, CCB/CPD 97-30 (ALTS Declaratory Ruling) and Common Carrier Docket No. 98-79 (GTE ADSL Tariff case).

In our meeting, it was suggested that I might make an additional submission for the record that would explain in more detail the legal grounds upon which the Commission (as opposed to state commissions) could take steps to clarify the status of calls to ISPs as appropriate for terminating compensation. Attached to this letter is such an additional submission. For convenience, I am providing Ms. Preiss a copy of that submission (including its attachments) on a diskette as well as in hard copy.

Please do not hesitate to call me if you have any questions or if I can be of any further assistance in this matter. I can be reached on 202-828-9811, or by email at csavage@crblaw.com.

Very truly yours,

Christopher W. Savage
COLE, RAYWID & BRAVERMAN

Counsel for ALEC, Inc.

cc: Ms. Magalie Roman Salas
Ms. Preiss

TERMINATING COMPENSATION FOR CALLS TO ISPs

I. INTRODUCTION, SUMMARY, AND BACKGROUND.

There is substantial controversy regarding the obligation of incumbent local exchange carriers ("ILECs") to compensate competing local exchange carriers ("CLECs") when an ILEC's customer uses the public switched network to establish a dial-in connection to an Internet Service Provider ("ISP"). There are strong policy reasons for requiring such compensation. Even if the desirability of that result is taken as a given, however, ILECs in particular have argued that while dial-in connections to ISPs are inherently interstate in nature (and therefore subject to the jurisdiction of the Federal Communications Commission (the "Commission")), their very interstate nature inherently disqualifies those connections for terminating compensation under Section 251(b)(5) of the Communications Act of 1934, as amended (the "Act").

In fact, there are at least four independent grounds upon which the Commission could rule that CLECs completing calls to ISPs are entitled to terminating compensation. The Commission should promptly issue a declaratory ruling adopting each of these alternative grounds, so that competition for the business of ISPs — and innovative technical developments designed to help integrate the Internet more efficiently with the public switched network — can continue, freed from the oppressive overhang of ILEC refusal to pay the terminating compensation necessary to recover the CLEC's costs.

Such a ruling is urgently needed even though all of the more than 20 state commissions to have considered the question (and all of the federal courts to have reviewed those state decisions) have concluded that terminating compensation is, indeed, due to CLECs for calls to ISPs that the CLECs serve. The continuing need for Commission action arises because the states' reasoning generally relies on Commission rulings that hold, in effect, that even though calls to ISPs are in some sense "really" interstate in nature, the Commission's policy is to treat ISPs just like other business end users.[2]

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[1] Procedurally, it seems that the declaratory ruling should logically be issued in the context of the ALTS declaratory ruling request, In the Matter of Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic, DA 97-1399, CCB/CPD 97-30. Even though ALTS has withdrawn its request for a declaratory ruling, that withdrawal does not deprive the Commission of the ability to decide the matter. Indeed, a full record of comments, replies, and various *ex parte* submissions relating to that matter has already been assembled.

[2] The Commission has made these statements most directly in the context of access charges under Section 201 of the Act. *See* In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, and End User Common Line Charges, *First Report and Order*, CC Docket Nos. 96-282 *et al.*, FCC 97-158 (released May 16,
(continued...)

To the states (and the federal courts that have affirmed their rulings), those Commission statements provide a sufficient basis to conclude that normal terminating compensation obligations under Section 251(b)(5) apply to calls to ISPs. To the ILECs, however, those very statements — particularly in the context of the Commission's access charge rulings — prove that terminating compensation cannot possibly apply.

The ILECs' basic argument is this: The purpose of Section 251(b)(5)'s terminating compensation requirement is to ensure that when two LECs jointly provide an end-to-end local call, the terminating LEC gets paid by the originating LEC for performing that function. The Commission has long held that calls to ISPs are jurisdictionally interstate. Jurisdictionally interstate traffic cannot be local traffic. Consequently, there legally cannot be a terminating compensation obligation with respect to calls made by end users to ISPs.

The beauty of this argument from the ILECs' perspective is that it can be (and is) asserted as a form of mantra or glassy-eyed syllogism: "Calls to ISPs are interstate. Interstate calls cannot be local. Therefore, no terminating compensation." The difficulty with this syllogism, as described below, is that its premises and conclusion are false. This lack of validity, however, has not prevented the major contestants from polarizing their arguments before the Commission along its lines. The ILECs claim that calls to ISPs are interstate and therefore

[2](...continued)
1997) ("*Access Charge Order*") at ¶¶ 341-48, *affirmed*. *Southwestern Bell v. FCC*, slip op., Nos. 97-2618 *et al.* (8th Cir. August 19, 1998) (Commission has the authority to require that ISPs be permitted to connect to the network like normal business end users). Commission statements in the context of universal service payment obligations under Section 254 of the Act, and local interconnection rights under Section 251(c) of the Act hold that ISPs are not and cannot legally be, "carriers," which obviously supports the conclusion that they are (or at least should be treated like) end users. *See* In the Matter of Federal-State Joint Board on Universal Service, *Report and Order*, CC Docket No. 96-45 (released May 8, 1997) ("*Universal Service Order*") at ¶¶ 788-90 (ISPs are end users, not carriers, and so do not have to pay universal service assessments); In the Matter of Federal-State Joint Board on Universal Service, *Report To Congress*, CC Docket No. 96-45 (April 10, 1998) at ¶ 13 ("We conclude ... that the categories of 'telecommunications service' and 'information service' in the 1996 Act are ***mutually exclusive***."). *See id.* at ¶ 21 (footnote omitted) ("We find ... that Congress intended to maintain a regime in which information service providers are not subject to regulation as common carriers merely because they provide their services 'via telecommunications'."); In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *First Report and Order*, CC Docket Nos. 96-98 and 95-185 (released August 8, 1996) ("*Local Competition Order*") at ¶ 995 (information services providers as such are not carriers and do not have interconnection rights under Section 251(c)). It hardly seems outlandish to conclude that the same result would and should obtain for purposes of terminating compensation under Section 251(b) of the Act.

cannot be subject to terminating compensation; the major CLECs (now) claim that calls to ISPs are inherently ***intrastate*** and therefore must be subject to such compensation.[3]

As noted, the ILECs' syllogism is flawed, and the apparent dilemma it creates is illusory. Nothing in Section 251(b)(5) requires that the LEC-to-LEC traffic to which a terminating compensation obligation applies be "local;" the statute speaks only of compensation for the "transport and termination of ***telecommunications.***" Even if the ILECs are correct that calls to ISPs are interstate, therefore, those calls are still "telecommunications" that one LEC is handing off to another LEC. Moreover, there is also no statutory basis for the assumption — without which the ILEC's argument collapses — that the same call cannot be both jurisdictionally interstate and at the same time "local" for purposes of terminating compensation.

To avoid this result, the ILECs routinely assert that calls that an end user makes to an ISP do not really "terminate" at the ISP. Instead, according to the ILECs, these calls "continue on" somehow into the Internet. This (erroneous) assertion plays two distinct roles in the ILECs' argument. First, it supports the claim (that few seriously contest) that the calls have an interstate component. Second — and actually more fundamental under Section 251(b)(5) — this assertion is used to argue that calls to an ISP do not really "terminate" with the ISP. If accepted, this claim would remove calls to ISPs from the scope of Section 251(b)(5).

The ILECs are wrong. As a factual matter, using any plausible definition of a "call" — as well as the statutory definition of "telecommunications" — calls from end users to ISPs do indeed "terminate" at the ISP's location. But even if the ILECs are right, that does not mean that the Commission is powerless to ensure that CLECs receive fair compensation for the functions they perform in receiving traffic from an ILEC and delivering that traffic to an ISP. To the contrary, if the ILECs were right, that would mean only that the Commission would need to rely on a statute other than Section 251(b)(5) to assure that CLECs are fairly compensated for their efforts.

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[3] It is difficult to take this latter claim wholly seriously. It is one thing to say that, as a matter of federal policy, calls to ISPs are to be treated like intrastate calls. It is quite another to assert that the Commission's broad jurisdiction — which covers all interstate communications by wire — does not reach calls used to access the Internet, which is, after all, an international (not merely interstate) network of packet-switched networks. *See* 47 U.S.C. § 230(e)(1) (defining "Internet"); In the Matter of Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation, *Memorandum Opinion and Order*, 7 FCC Rcd 1619 (1992) ("*Voice Mail Order*") at ¶¶ 10-12 (discussing extent of Commission's jurisdiction). In any case, the Commission is on record for the last fifteen years — including its recent presentation to the 8th Circuit in the *Southwestern Bell* case — that such calls, if not wholly interstate, are so pervasively jurisdictionally mixed the Commission, not the states, has ultimate regulatory authority for them. Indeed, the 8th Circuit in *Southwestern Bell* affirmed the Commission's treatment of ISPs for access charge purposes in part on the basis of the court's agreement that calls to ISPs are jurisdictionally mixed. It would be peculiar in these circumstances (and would call for some fairly heroic efforts at explanation by the Commission) to shift gears and conclude that there is ***no*** interstate component to calls to ISPs.

The logical statute to effect this purpose (if the ILECs are right) is Section 201 — the statute under which the Commission has established its access charge regime governing the exchange of interstate traffic among carriers. Indeed, Section 201 would be a particularly appropriate alternative to Section 251(b)(5) because Section 251(i) expressly states that "nothing in [Section 251] shall be construed to limit or otherwise affect the Commission's authority under section 201."

Based on these considerations, the Commission should issue a declaratory ruling that affirmatively directs ILECs to pay terminating compensation to CLECs for calls to ISPs. This declaratory ruling should expressly contain four alternative grounds for the conclusion reached, which should be that a LEC terminating a call to an ISP that originated with another LEC is entitled to compensation for performing that function:

> **First,** the Commission should declare that in light of the jurisdictionally mixed nature of the traffic sent from end users to ISPs, the Commission has the authority to direct the treatment of such traffic for all purposes, including the treatment of such traffic under Section 251(b)(5). This Commission authority over jurisdictionally mixed traffic was recently affirmed in the *Southwestern Bell* case. On this basis, the Commission should declare that traffic originating with an ILEC's end user and bound for an ISP may not be treated differently than traffic bound for other end users, without a negotiated provision in an interconnection agreement that expressly leads to a different result.
>
> **Second,** the Commission should declare that nothing in Section 251(b)(5) limits the LEC-to-LEC terminating compensation obligation to "intrastate" or even "local" traffic, and that, to the extent that ISP-bound traffic is interstate, the Commission has the authority to determine how Section 251(b)(5) will apply to it. The Commission should then direct that ISP-bound traffic handed off from one LEC to another is subject to terminating compensation obligations (again, in the absence of an express, negotiated provision in an interconnection agreement dictating a different result).
>
> **Third,** the Commission should declare that, to the extent that Section 251(b)(5) is read to be limited only to "local" calls, the only "call" involved in a dial-up connection to an ISP begins with the end user and ends with the ISP, and is therefore "local" despite being jurisdictionally interstate. The Commission has the authority to determine the appropriate terminating compensation treatment of such calls due to their interstate nature, and should direct that the terminating compensation obligation of Section 251(b)(5) applies to such calls on the same basis as any other local calls.
>
> **Fourth,** the Commission should declare that if the interstate nature of the traffic sent from an ILEC end user to an ISP served by a CLEC precludes the application of the terminating compensation obligation of Section 251(b)(5), then

the Commission, acting on the basis of its authority under Section 201, directs any LEC handing off ISP-bound traffic to another LEC to pay the LEC receiving the traffic an interstate charge equal to the terminating compensation rate in any interconnection agreement they have entered into under Section 251.

Finally, as part of any ruling the Commission issues, the Commission should state its view that nothing in its prior orders regarding access charges or otherwise should be interpreted by any state commission or federal court as indicating that the Commission believes that calls to ISPs are ***not*** properly subject to the terminating compensation obligation of Section 251(b)(5). This will in all contexts minimize the degree to which the ILECs can credibly rely on Commission precedent as a basis for attempting to avoid their terminating compensation obligations.

The remainder of this document is organized as follows. Section II briefly outlines the policy basis for requiring terminating compensation for calls to ISPs. Section III briefly summarizes the legal basis for each of the separate declaratory rulings that the Commission should issue. Finally, Section IV addresses some of the practical implications of the issuance of the declaratory rulings outlined above.

II. REQUIRING TERMINATING COMPENSATION IS SOUND POLICY.

There are strong policy reasons favoring the payment of terminating compensation for calls to ISPs.[4] Briefly, there are at least three independent policy grounds for requiring such compensation.

First, requiring terminating compensation is necessary as part of the transition from monopoly to competitive local exchange markets. When an ISP disconnects its dial-in lines from the ILEC's switch and connects them to the CLEC's switch, the ILEC saves costs in various ways, while the CLEC begins to incur them. The ILEC, however, continues to obtain revenue

[4] Attached to this document are five exhibits. Exhibit A is the Comments of Adelphia Communications, *et al.* in the ALTS declaratory ruling matter (DA 97-1399, CCB/CPD 97-30, filed July 17, 1997). Exhibit B is the Reply Comments of Adelphia Communications, *et al.* in that same matter (filed July 31, 1997). Exhibit C is a letter dated August 6, 1998 from C. Savage to W. Kennard regarding terminating compensation obligations. Exhibit D is a copy of the complaint filed by ALEC, Inc. against BellSouth Telecommunications with the Kentucky PSC dated May 5, 1998, and referred to in the letter to Chairman Kennard. Each of these exhibits discusses the policy basis for requiring terminating compensation for calls to ISPs. Finally, Exhibit E is a copy of the Comments of Retail Internet Service Providers in CC Docket 98-146 (the Section 706 Notice of Inquiry). Exhibit E contains materials relevant to a consideration of the relationship between a ruling on reciprocal compensation obligations for calls to ISPs and the ongoing investigation of GTE's ADSL tariff, as well as certain information relevant to the policy need for retaining terminating compensation for calls to ISPs. For the Bureau's convenience, all of these exhibits are being provided in both hard copy and diskette.

from its end users to cover the costs of calls those end users originate. Consequently, as an economic matter, it would make no sense to permit the ILECs to save costs (when the ISP switches to the CLEC for service) yet retain the end user revenues they collect to cover those costs.

Second, refusing to require terminating compensation is anticompetitive, particularly from the perspective of the ISPs. Without terminating compensation, CLECs will have no access to the revenues from the ILEC's end users, whose decisions to call ISPs (for which the ILEC would be paid) cause the CLEC to incur the significant switching costs involved in terminating those calls. Without that revenue, CLECs would be forced to raise their price to ISPs to cover the costs of the incoming calls. The ILEC, however — with access to revenues from its end users who are making the calls and therefore causing the costs to be incurred — would continue to offer the ISP incoming dial-tone lines at regulated business rates that are not designed to cover the costs of incoming calls.

CLECs, therefore, would not find it economical to service ISPs, who could get cheaper service from the ILEC. This would destroy competition for the business of ISPs and would leave ISPs to the tender mercies of the ILEC for their connections to the public switched network. In light of the now well-documented abuses of ISPs by ILECs,[5] it would be ill-advised for the Commission to sanction such a result, which, in any case, seems directly contrary to the pro-competitive purpose of the 1996 Act.

Third, a requirement that ILECs pay terminating compensation for calls to ISPs served by CLECs provides immediate and direct market pressure on ILECs to avoid inflating their terminating compensation rates. If the ILECs know that they will have to pay terminating compensation to CLECs for a large number of minutes, the ILECs will be highly motivated to establish (whether in negotiations or in arbitrations) a truly cost-based (*i.e.*, low) rate for call transport and termination.

The policy rationale for requiring terminating compensation for calls to ISPs, therefore, seems clear. The more interesting questions are the basis and scope of the Commission's legal authority to resolve this issue. As described below, there are several independent grounds upon which the Commission could rely in resolving these questions on an industry-wide basis, whether in connection with interconnection agreements between ILECs and competitors, or otherwise.

[5] *See* Exhibit E.

III. THE COMMISSION SHOULD ISSUE A DECLARATORY RULING ARTICULATING FOUR DISTINCT GROUNDS FOR REQUIRING THE PAYMENT OF TERMINATING COMPENSATION FOR CALLS TO ISPs.

A Commission ruling resolving the dispute regarding terminating compensation for calls to ISPs must satisfy four interrelated constraints. First, the ruling must comport with the language and purpose of the statutes on which the Commission relies (principally Section 251 and Section 201). Second, the ruling must not depart from the Commission's own precedents regarding the regulatory treatment of ISPs and traffic routed to them (principally in the areas of access charges, universal service, and local interconnection). Third, the ruling must not run afoul of court rulings addressing any of these matters (principally the 8th Circuit's rulings in *Iowa Utilities Board* and *Southwestern Bell*).[6] Finally, while meeting all these constraints, the ruling must achieve the sound policy goal of requiring terminating compensation.

The Commission can achieve all of these objectives by issuing a declaratory ruling that requires the payment of terminating compensation (in the absence of an express agreement not to pay it) on four alternative grounds. The discussion below describes the basic logic that the relevant declaratory rulings should take.

A. The Commission Should Declare That ISP-Bound Traffic Is Subject To Terminating Compensation On The Basis Of The Mixed Jurisdictional Status Of Such Traffic.

The Commission has long held that ISPs are to be treated as end users for purposes of access charges, despite the interstate (or mixed) nature of calls to ISPs. This basic approach was recently affirmed by the 8th Circuit in the *Southwestern Bell* case. The court held:

> [T]he FCC has determined that the facilities used by ISPs are "jurisdictionally mixed," carrying both interstate and intrastate traffic. FCC Brief at 79. Because the FCC cannot reliably separate the two components involved in completing a particular call, or even determine what percentage of overall ISP traffic is interstate or intrastate, see id. (noting that at least some ISP services are purely intrastate and not susceptible to FCC regulation), the Commission has ***appropriately exercised its discretion to require an ISP to pay intrastate charges for its line and to pay the SLC (which has been increased in the Order to cover a greater proportion of interstate allocated loop costs), but not to pay the per-minute interstate access charge.*** The states are free to assess intrastate tariffs as they see fit. In these circumstances, we cannot say that

[6] *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), *cert. granted*, 118 S. Ct. 879 (1998); *Southwestern Bell v. FCC*, slip op., Nos. 97-2618 *et al.* (8th Cir. August 19, 1998).

> the FCC has shirked its responsibility to regulate interstate telecommunications, nor can we conclude that it has directed the States to inflate intrastate tariffs to cover otherwise unrecoverable interstate costs, thereby exceeding its statutory authority. See Iowa Utils. Bd. v. FCC, 120 F.3d 753, 796 (8th Cir. 1997) (holding that FCC lacks authority to determine intrastate rates), cert. granted, 118 S. Ct. 879 (1998).

The emphasized language confirms (a) that in a situation with jurisdictionally mixed traffic, the Commission has the authority to determine how the traffic will be treated for regulatory purposes; and (b) that calls to ISPs are one such situation.[7]

Relying on this holding, the Commission should declare that the proper treatment of ISP-bound traffic for purposes of terminating compensation under Section 251(b)(5) is that such traffic be treated like traffic bound for any other end user. This ruling would not purport to bar ILECs and CLECs in negotiating an interconnection agreement from reaching a different result; it would merely establish the treatment of ISP-bound traffic that would apply in the absence of an express agreement to the contrary

This ruling would be consistent with, and would be strengthened by, the Commission's recent conclusion in the *Report to Congress* that ISPs, as information service providers, legally ***cannot*** be regarded as "carriers." This holding virtually compels rejection of the key ILEC assertion that telecommunications traffic from end users to ISPs somehow "continues on" beyond the ISP itself, in a manner analogous to a traditional long distance telephone call. Under the analysis in the *Report to Congress* (as well as in the basic *Universal Service Order*), the ISP can reasonably be viewed as a demarcation point at which "telecommunications" used to reach the ISP ends, and "information services" provided by the ISP begin.

Moreover, the 8th Circuit in the *Southwestern Bell* case specifically rejected ILEC arguments that it was irrational to distinguish between ISPs and their connections to the local network, on the one hand, and IXCs' use of the local network, on the other. The court stated that:

> the Commission's actions [refusing to require ISPs to pay access charges] do not discriminate in favor of ISPs, ***which do not utilize LEC services and facilities in the same way or for the same purposes as other customers who are assessed per-minute interstate access charges.***

[7] *See also Voice Mail Order, supra* note 3 at ¶¶ 13-21 (discussing Commission jurisdiction over inseparably "mixed" traffic).

(Emphasis added, footnote omitted). Even though the traffic flowing between an ISP and an end user is jurisdictionally mixed, therefore, it is reasonable to conclude that such traffic should be treated like any other traffic being routed to an end user, as opposed to traffic being routed to some type of "carrier."

Issuing this declaratory ruling would not conflict with the 8th Circuit's decision in *Iowa Utilities Board.* The Commission would not be setting rates for interconnection arrangements or unbundled elements, which the court held were exclusively the functions of state commissions.[8] Nor would the Commission be directing states how to handle any interconnection arrangement as it relates to intrastate communications. Instead, the Commission would be clarifying that certain jurisdictionally mixed traffic — over which the Commission plainly has regulatory authority, as the 8th Circuit itself held *Southwestern Bell* — should be treated in a particular way, consistent with the treatment of such traffic for purposes of access charges, universal service, and local interconnection rights.[9]

It does not matter in this regard that the Commission's specific rules regarding transport and termination of traffic were vacated by the court in *Iowa Utilities Board.* Those rules were vacated because, in the court's view, the Commission was usurping state authority to apply the terms of the statute to what was predominantly intrastate, local traffic.[10] The court was fundamentally concerned with ensuring that the Commission respected the states' authority over intrastate traffic, not with restricting the Commission's exercise of its jurisdiction with regard to interstate traffic. The Commission has authority over interstate (or, as the *Southwestern Bell* case shows, inextricably mixed) traffic. The Commission here would be basing the declaratory ruling noted above on a direct interpretation of how Section 251(b)(5) should apply to traffic over

[8] 120 F.3d at 793-800.

[9] Indeed, the only conflict with the *Iowa Utilities Board* decision would arise if the Commission accepted the claim advanced by some CLECs that calls to ISPs are actually wholly ***intra***state in nature, yet nonetheless attempted to direct how such calls should be handled for purposes of terminating compensation under Section 251(b)(5). This conflict seems unlikely to arise. *See* note 3, *supra.* In this regard, while the court in *Iowa Utilities Board* obviously assumed that in the normal course the transport and termination of traffic would be an intrastate function (*see* 120 F.3d at 799), that same court has recognized in *Southwestern Bell* that calls to ISPs are in a separate jurisdictional category. In this regard, *Iowa Utilities Board* itself recognized an exception from its general holding for interconnection arrangements between wireless carriers and ILECs, based on the special status of wireless traffic. *See* 120 F.3d at 800 n.21. The logic of these two holdings is that the interstate or mixed nature of ISP-bound traffic gives the Commission the legal authority to determine the application of Section 251(b)(5) to such traffic (in the absence of an alternative solution negotiated by particular ILECs and CLECs).

[10] *See* Exhibit B hereto (Adelphia Reply Comments) (noting that the court in *Iowa Utilities Board* was at pains to specify that the traffic at issue was ***intra***state in nature).

which the Commission has jurisdiction. That action is perfectly consistent with *Iowa Utilities Board*.[11]

This ruling would result in consistent treatment for interconnection agreements that have already been entered into (and perhaps litigated over) and interconnection agreements that are now under negotiation (or will be negotiated in the future). This ruling would confirm the conclusions reached in more than 20 states that ISP-bound traffic is subject to terminating compensation, and would eliminate any possibility that a state commission or a court could reasonably accept the ILECs' stock argument that the interstate nature of ISP-bound traffic means that such traffic is not subject to terminating compensation. It would also eliminate the ability of ILECs to claim in good faith during the negotiation of new agreements that the interstate nature of the traffic provides a basis for treating such traffic differently from other traffic to which terminating compensation applies.

B. The Commission Should Rule That Section 251(b)(5) Fully Applies To Interstate Traffic Exchanged By LECs.

As noted above, Section 251(b)(5) by its terms imposes a terminating compensation obligation on all "telecommunications" traffic exchanged by LECs. Nothing in the statutory language states or implies that the terminating compensation obligation is limited to any particular type of "telecommunications" traffic.

As a result, the Commission should issue a declaratory ruling that to the extent that LECs exchange interstate telecommunications traffic between an end user and an ISP, the Section 251(b)(5) terminating compensation obligation applies to such traffic.

This ruling is slightly different than that described in Section III.A. above. The gist of the earlier proposed ruling is a Commission directive that traffic between end users and ISPs be "treated like" other traffic to which terminating compensation applies. The gist of this proposed ruling is a flat holding that terminating compensation ***does*** apply to interstate "telecommunications" traffic exchanged by LECs, including, specifically, traffic between end users and ISPs.[12]

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[11] Indeed, as explained in Exhibits A and B (Adelphia Comments and Reply Comments), the *Iowa Utilities Board* court's treatment of the Commission's authority with regard to wireless traffic shows that the court fully understood that where the Commission could lawfully assert jurisdiction with respect to a particular class of traffic, it was proper for the Commission to establish the basic interconnection rules under Section 251(b) and Section 251(c). The interstate/mixed status of ISP-bound traffic gives the Commission similar authority in this area as well.

[12] Again, individual ILECs and CLECs would be free to negotiate interconnection deals that waived or modified this "default" rule for interstate traffic.

This second proposed declaratory ruling would be fully consistent with *Iowa Utilities Board* for the reasons discussed above: because the traffic is (by hypothesis) interstate in nature, the Commission is legally entitled to set the basic rules for how Section 251 will apply to that traffic. This second proposed declaratory ruling would have the same effect on existing and new interconnection agreements as described above.

C. The Commission Should Rule That Calls To ISPs Can Be, And Are, Simultaneously "Local" Calls And Jurisdictionally Interstate.

As noted above, there is no requirement in Section 251(b)(5) that the "telecommunications" to which the terminating compensation obligation applies be either "intrastate" or "local." Even so, many in the industry and regulatory community seem to assume that only "local" traffic is covered by that obligation. This is the basis for the ILECs' basic claim that terminating compensation cannot apply to calls to ISPs: since the traffic is interstate, they argue, it cannot be "local," and, therefore, cannot be subject to a compensation obligation.

The Commission's third declaratory ruling should state that even if one views the terminating compensation obligation as applying only to "local" traffic, calls to ISPs can properly be viewed as "local" even though the communications carried on those calls are jurisdictionally interstate or mixed. The statutory basis for this conclusion is laid out in some detail in the attachments to this document. Briefly, the status of a particular call as "local" depends on whether the public switched network stations being connected are in the same exchange area, while the status of a particular communication as interstate or intrastate depends on whether the signals or intelligence transmitted ***in any form*** (not merely between stations on the public switched network) originate and terminate in different states. In the case of calls to ISPs, the only exchange lines being connected are the end user's and the ISPs (assumed, here, to be in the same state-determined local calling area), so such calls are "local" even if the underlying communication is jurisdictionally interstate or mixed

The court in *Southwestern Bell* expressly recognizes that calls to ISPs — which that court was at pains to note carry interstate or mixed traffic — can nevertheless be local. In describing why ISPs cannot reasonably be analogized to IXCs, the court states:

> the Commission's actions [refusing to require ISPs to pay access charges] do not discriminate in favor of ISPs, which do not utilize LEC services and facilities in the same way or for the same purposes as other customers who are assessed per-minute interstate access charges.

A footnote to this language then states:

> ISPs subscribe to LEC facilities in order to ***receive local calls*** from customers who want to access the ISP's data, which may or may not be stored in computers outside the state in which the call was

> placed. An IXC, in contrast, uses the LEC facilities as an element in an end-to-end long-distance call that the IXC sells as its product to its own customers.

Southwestern Bell v. FCC at n.9. If the court was in any way concerned by the idea that a "local call" could be used to send and receive interstate or mixed traffic, there is no indication of such concern in its opinion.

The gist of this proposed ruling — that the relevant "telecommunications" terminates at the ISP — would also be consistent with the Commission's repeated holdings in the universal service context that ISPs are not carriers, and do not perform "telecommunications services" for their customers. As the Commission observed in the *Report to Congress*, ISPs

> use telecommunications networks to reach their subscribers, ***but they are in a very different business from carriers.*** [ISPs] provide their customers with value-added functionality by means of computer processing and interaction with stored data. They leverage telecommunications connectivity to provide these services, but this makes them ***customers*** of telecommunications carriers rather than their competitors.[13]

Therefore, the Commission should rule that, while there is no requirement in Section 251(b)(5) that terminating compensation be limited to "local calls," to the extent that such a limitation exists, calls to ISPs are both "local" and jurisdictionally "interstate." Because they are jurisdictionally interstate, the Commission may lawfully determine how they should be treated (in the absence of a contrary negotiated result) for terminating compensation purposes. And, because they are "local," terminating compensation is clearly appropriate. Plainly stated, the Commission should rule that when a call reaches an ISP, the "telecommunications" used to get the call there terminate, and the ISP's "information services" functions take over.

This ruling, like the two described above, would apply equally to both new and existing interconnection agreements, and would substantially clarify (if not literally dictate) the correct result in any pending state commission proceedings or litigation arising from such proceedings relating to calls to ISPs.

D. The Commission Should Declare That If ISP-Bound Traffic Is Not Subject To Terminating Compensation Under Section 251(b)(5), Then The Originating LEC Should Be Required To Pay The Terminating LEC On The Basis Of The Commission's Authority Under Section 201.

A fourth alternative basis for imposing a LEC-to-LEC terminating compensation obligation in connection with calls end users make to ISPs would be an alternative holding that

[13] *Report to Congress* at ¶ 105 (emphasis supplied)

would apply only if it is concluded that the interstate (or mixed) nature of calls to ISPs precludes application of Section 251(b)(5).

If Section 251(b)(5) does not apply to the LEC-to-LEC exchange of telecommunications traffic from end users to ISPs, that can only be as a result of a conclusion that such traffic is legally and/or factually different from other seemingly "local" calls that end users make. The only conceivable difference would be that the calls carry interstate (or mixed) telecommunications traffic that in some sense does not "terminate" at the ISP's location, but instead is best viewed as continuing on beyond the ISP into "the Internet." While the Commission itself would already have rejected these arguments (*i.e.*, the position of the ILECs) in the previous declaratory rulings, it is conceivable that a reviewing court would accept them. It would therefore be prudent to address why the same substantive result — terminating compensation — applies even if Section 251(b)(5) does not.

If it is true that (1) telecommunications traffic bound for ISPs from end users is interstate in nature and that (2) that interstate nature precludes application of Section 251(b)(5) when and ILEC and a CLEC exchange such traffic, then the Commission plainly has jurisdiction over such calls under Section 201 (the statutory basis of the Commission's access charge regime). These calls would simply be a new species of interstate traffic exchanged between carriers acting in their interstate capacity. There can be no question that under Section 201, the Commission may determine the charges that the two carriers (ILEC and CLEC) may assess on one another for any and all interstate traffic. It follows that ***if*** the ILECs are correct that Section 251(b)(5) does not apply to the exchange of ISP-bound traffic, then Section 201 ***must*** apply.

The Commission has ruled that for access charge purposes, ISPs are to connect to the network like any other end user and may not be assessed "access charges" as such. This means that in the case of calls to an ISP, the originating LEC will have received payment from the end user to cover the costs of completing the call, including both local usage charges (either assessed per minute or per call, or included as part of a flat-rated local usage package) and the recently-increased SLCs for second lines (often used to allow end users to access the Internet).

As a result, the terminating LEC may not assess "access charges" on the ISP to recover its (by hypothesis) interstate costs involved in routing traffic to the ISP. The originating LEC, however, will have obtained all available revenue to cover such costs from its end users. It is therefore fair and reasonable (under Section 201) to require the originating LEC to pay the terminating LEC for the terminating LEC's costs routing such traffic to the ISP.[14]

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[14] Note in this regard that Section 251(i) states that nothing in Section 251 limits or constrains the Commission's authority under Section 201. If, therefore, the ILECs are correct that Section 251 does not apply, there is no possible basis for a conclusion that any Commission action under Section 201 somehow interferes with or impedes any aspect of the operation of Section 251. If Section 201 applies to LEC-to-LEC exchanges of calls to ISPs — and it must if the ILECs' argument is credited — then the Commission has full and unfettered discretion to take whatever action under Section 201 (continued...)

The Commission, therefore, should issue a declaratory ruling that *if* calls to ISPs are not subject to terminating compensation under Section 251(b)(5), then a LEC handing off such calls to another LEC owes the terminating LEC an interstate charge to be established under the Commission's Section 201 authority. To minimize ambiguity, the Commission should rule that the per-minute call termination rate in any local interconnection agreement between affected LECs shall serve as the appropriate rate under Section 201 (in the absence of an effective tariff establishing a different rate). Moreover, the Commission should rule that any interconnection agreement between the affected LECs should be treated as a "contract[] ... with [an]other carrier[] ... in relation to traffic affected by the provisions of this Act" under Section 211(a). These contracts should be deemed to be binding and effective for purposes of Section 201 and Section 211 as of the effective date of the contract itself.

These latter rulings would ensure that existing and future LEC-to-LEC exchanges of ISP-related traffic are treated in a reasonable and equitable manner. Indeed, it would be unjust in the extreme for ILECs to resist paying terminating compensation on the grounds that the traffic in question is interstate in nature, then also claim that no payments under the auspices of specific requirements of this Commission are due either. Indeed, because the ILECs will have been receiving funds from their end users to cover the costs of calls to ISPs (as noted above), it would constitute unjust enrichment to enable them to retain those funds even though CLECs have been involved in actually terminating such calls.

E. The Commission Should Also Clarify That Its Current Precedents Support, Not Undermine, Terminating Compensation Obligations.

Finally, the Commission's order should state that the only reasonable conclusion to draw from its existing precedents is that ISPs are to be treated as end users for all purposes and that, therefore, there is no basis for any argument based on those precedents that calls to ISPs would not normally be subject to terminating compensation under Section 251(b)(5).[15] The purpose of this ruling would be to clarify the Commission's position for purposes of ongoing litigation regarding terminating compensation, and to prevent the ILECs from arguing that the Commission's own statements or orders in any way support their claim that terminating compensation for calls to ISPs is inappropriate.

IV. POLICY IMPLICATIONS OF THE PROPOSED DECLARATORY RULINGS.

There has been some industry concern that the Commission's treatment of xDSL services — most immediately, the pending GTE tariff offering a form of such services — will

[14](...continued)
that it deems to be in the public interest. As a result, there is no possible basis for concluding that the declaratory ruling proposed here could in any way run afoul of the holding of the *Iowa Utilities Board* case.

[15] *See* Exhibit D.

be determined by the Commission's analysis of terminating compensation for dial-up calls to ISPs, or vice versa. As described below, this concern is misplaced, and the Commission should take the first reasonable opportunity to clarify this point.

A recognition that end-user-to-ISP traffic is either interstate or jurisdictionally mixed does not compel any particular result in the proceeding relating to whether GTE may properly file its pending ADSL tariff as an interstate offering.[16] To the extent that GTE or others claim that all connections to the Internet are inherently interstate in nature, that claim would appear to be contrary to the Commission's views (stated to and adopted by) the court in the *Southwestern Bell* case) that traffic between end users and the Internet is jurisdictionally mixed. But this is hardly an unprecedented situation. Telecommunications links — from POTS loops to fiber optic special access facilities to frame relay networks — are routinely used for both interstate and intrastate communications.

The GTE situation is probably best approached in the short run by determining whether the GTE ADSL offering is more akin to an unswitched (or at least un-circuit-switched) private line or a circuit-switched POTS loop. If the offering is more akin to a private line, then all that is required to justify an interstate tariff filing is a conclusion that 10% or more of the traffic on the line will be interstate in nature.[17] If the offering is more akin to a switched POTS loop, then the normal rule would call for an intrastate tariff filing, even though (like a POTS loop) the ADSL capability may be used to carry both interstate and intrastate traffic. But the choice between these two does not depend on making any definitive ruling on the jurisdictional nature of all, or even most, end-user-to-ISP traffic. To the contrary, state-tariffed POTS loops are routinely used to carry interstate traffic, and federally-tariffed private line/special access services are routinely used to carry intrastate traffic.[18]

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[16] The following discussion is devoted entirely to the question of the jurisdictional nature of the service GTE plans to offer. No view on any other aspect of the tariff (such as rates, cost methodology used to develop rates, terms and conditions of the service, etc.) should be implied.

[17] *See* 47 C.F.R. § 36.154(a) (setting out "10% rule").

[18] The Commission in the GTE case, however, should clarify (to the extent that it has not done so already) that the service being tariffed is the high-speed ADSL capability, not the basic POTS service (that would still be provided over the upgraded loop). Otherwise, the Commission will be facilitating bundling of POTS and ADSL services, which can only lead to anticompetitive results in the marketplace. *See* Exhibit E. In this regard, if the Commission adopts the "private line" analogy, then the costs of the ADSL service would be reflected as, in effect, a new type of special access service, whereas if the Commission adopts the "switched service" analogy, then whatever portion of the costs of the ADSL service that are assigned to the interstate jurisdiction would be reflected in what would be, in effect, a new SLC rate element applicable only to ADSL loops and designed to recover only ADSL costs.

Concerns that the result in the GTE ADSL case and the proper treatment of reciprocal compensation for calls to ISPs are inextricably linked, therefore, would appear to be overblown. That said, if the Commission rules on the GTE ADSL tariff before it issues the declaratory rulings described earlier in this document, it should clearly state that jurisdictionally interstate traffic may and should be carried on any state-tariffed xDSL facility (if federal tariffing is rejected), or that jurisdictionally intrastate traffic may and should be carried on any federally-tariffed xDSL facility (if federal tariffing is permitted). In short, whether or not GTE may federally tariff its ADSL offering is fundamentally a separate question from whether terminating compensation is required on dial-up calls (or even xDSL links) between end users and the Internet, and any ruling in the GTE matter should so state.[19]

[19] The apparent view of some that the Commission's decision in the GTE ADSL matter ***does*** relate to the correct answer to the reciprocal compensation debate reflects an undue fixation on the false dichotomy presented by the ILECs, *i.e.*, that if calls to ISPs are interstate, they cannot be subject to reciprocal compensation. It also reflects a failure to appreciate that many intrastate-tariffed facilities carry interstate traffic, and vice versa.

EXHIBIT A

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Common Carrier Bureau
1919 M Street, N.W.
Washington, D.C. 20554

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OFFICE OF THE SECRETARY

In the Matter of Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic	DA 97-1399 CCB/CPD 97-30

COMMENTS OF ADELPHIA COMMUNICATIONS CORPORATION BENCHMARK COMMUNICATIONS, INC., CENTURY COMMUNICATIONS CORP., DANIELS CABLEVISION, INC., FREDERICK CABLEVISION, INC., GREATER MEDIA, INC., INTERMEDIA PARTNERS, JAMES CABLE PARTNERS, L.P., JONES INTERCABLE, INC., MARCUS CABLE COMPANY, L.P., RIFKIN AND ASSOCIATES, INC., STARSTREAM COMMUNICATIONS, INC., AND WINDKEEPER COMMUNICATIONS, INC.

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July 17, 1997

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I. INTRODUCTION AND SUMMARY.

Each of the Joint Commenters[1] provides or plans to provide competitive local exchange services, Internet access service, or both, either directly or through related firms. The Joint Commenters, therefore, have a direct interest in regulatory and competitive issues regarding connections between Internet Service Providers (ISPs) and the public switched network.

Some incumbent local exchange carriers (ILECs) claim that calls from their end users to an ISP served by a competing local exchange carrier (CLEC) are not subject to

[1] The Joint Commenters are (in alphabetical order) Adelphia Communications Corporation, Benchmark Communications, Inc., Century Communications Corp., Daniels Cablevision, Inc., Frederick Cablevision, Inc., Greater Media, Inc., Intermedia Partners, James Cable Partners, L.P., Jones Intercable, Inc., Marcus Cable Company, L.P., Rifkin and Associates, Inc., Starstream Communications, Inc., and Windkeeper Communications, Inc.

terminating compensation under Sections 251(b)(5) and 252(d)(2) of the Communications Act.[2] The ILECs' position is both profoundly anticompetitive and contrary to all relevant Commission precedent. As a result, the Joint Commenters agree with ALTS that the Bureau should promptly issue a ruling that a LEC is entitled to compensation for calls made by another LEC's end users to ISPs served by the LEC receiving the calls.

If the ILECs succeed in their campaign to avoid paying terminating compensation for calls to ISPs, they will regain their monopoly on the provision of circuit-switched links between the Internet and the public switched network. This will occur because, without compensation for the costs of terminating calls to ISPs, the CLECs' only economically sensible choice would be to avoid ISPs as customers and focus their competitive efforts elsewhere. The CLECs will be deprived of significant market opportunities, and competition between CLECs and ILECs will be distorted.

The problem is even worse from the ISPs' perspective. ISPs are attractive customers in that they are heavy users of many telecommunications services, ranging from POTS lines to high-capacity T1 links to more advanced carrier services. If the ILECs can freeze the CLECs out of this market segment, ISPs will pay more for their dial-up lines and other services, and be forced to charge their subscribers higher rates than would exist in a competitive market. Moreover, the ISPs would be totally dependent upon the ILECs for essential connections to the public switched network, just as the ILECs are attempting to enter the dial-up ISP business. This result would fly in the face of the "policy of the United States ... to promote the continued development of the Internet and other interactive computer services."[3]

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[2] *See* Pleading Cycle Established for Comments on Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic," CCB/CPD 97-30, DA 97-1399 (released July 2, 1997) ("Public Notice"). The Public Notice was issued in response to a letter from Richard J. Metzger (Association for Local Telephone Service) to Regina M. Keeney (FCC) dated June 20, 1997 ("ALTS Letter"), attaching communications from NYNEX and Southwestern Bell stating the ILECs' position. One of the Joint Commenters received ***today*** a letter from Bell Atlantic stating that ILEC's view. *See* Attachment A to these Comments.

[3] 47 U.S.C. §230(b)(1).

These profound anticompetitive consequences indicate that the Bureau should reject the conclusion that calls to ISPs are not subject to reciprocal compensation, unless that conclusion is unequivocally compelled by the Communications Act itself, or by an unambiguous Commission decision interpreting it. In fact, however, the ILECs' position is contrary to the Act and to all relevant Commission precedent.

The Commission has long held, and recently reaffirmed, that ISPs are to be treated as end users for purposes of access charges.[4] Moreover, in the recently-issued *Universal Service Order*, the Commission held that it is reasonable to distinguish between circuit-switched telephone calls to ISPs (which ***are*** "telecommunications") and the packet-switched Internet transactions that ISPs facilitate (which are ***not*** "telecommunications").[5] And, in the *Local Competition Order*, the Commission specifically declined to grant ISPs direct interconnection rights against LECs under Sections 251(b) and (c), precisely because ISPs are not inherently "telecommunications carriers" entitled to such interconnection.[6] All of these rulings indicate a consistent understanding that, from the perspective of the circuit-switched public telephone network, ISPs are end users. It follows that if the individual end user and the ISP are in the same local calling area, the normal rules for terminating compensation should apply for calls to the ISP.

This understanding is in harmony with Section 252(d)(2), which indicates that reciprocal compensation applies to "calls." Both elsewhere in Title II of the Communications Act and in common usage, the term "call" refers to a normal circuit-switched connection between two

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[4] In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, and End User Common Line Charges, *First Report and Order*, CC Docket Nos. 96-282 *et al.*, FCC 97-158 (released May 16, 1997) ("*Access Charge Order*") at ¶¶ 341-48.

[5] In the Matter of Federal-State Joint Board on Universal Service, *Report and Order*, CC Docket No. 96-45 (released May 8, 1997) ("*Universal Service Order*") at ¶¶ 788-90.

[6] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *First Report and Order*, CC Docket Nos. 96-98 and 95-185 (released August 8, 1996) ("*Local Competition Order*") at ¶ 995

standard telephone lines. A circuit-switched call to the Internet plainly terminates at the ISP's point of presence, even though packet-switched transactions occur within the Internet as a result of signals sent on the circuit-switched call. There is no reason to invent a different definition that would extend a call to the Internet beyond the point on the public switched network at which the call, as commonly understood, terminates. As a result, it is completely reasonable to treat the circuit-switched call to the Internet as subject to reciprocal compensation under Sections 251(b)(5) and 252(d)(2) of the Act.

There is no merit to the ILECs' claim that, because traffic to and from the Internet is jurisdictionally interstate, end users' calls to the Internet cannot be local. For the last fourteen years, the exemption from interstate access charges for enhanced service providers (ESPs) has been premised on the assumption that the traffic between end users and ESPs is jurisdictionally interstate. Otherwise, there would have been no need for an "exemption" in the first place. The fact that traffic flowing between end users and the Internet is jurisdictionally interstate no more precludes the availability of terminating compensation under Sections 251(b)(5) and 252(d)(2) than it requires the assessment of interstate access charges under Sections 201 and 202.[7] To the contrary, ***requiring*** terminating compensation for calls to the Internet is the only way to harmonize the treatment of ISPs and the Internet generally in the *Local Interconnection Order*, the *Universal Service Order* and the *Access Charge Order*.

There is nothing contradictory about a ***call*** being classified as local even though the ***traffic*** carried on the call is jurisdictionally interstate. The most recent and most relevant example of this situation is the treatment of calls between a landline LEC and a Commercial Mobile Radio Service (CMRS) provider. In that situation, the Commission specifically ruled that calls that originate and terminate within the CMRS provider's Major Trading Area (MTA) are to be treated as local for purposes of reciprocal compensation.[8] The fact that such calls typically

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[7] *See* In the Matter of Amendments to Part 69 of the Commission's Rules Relating to Enhanced Service Providers, 3 FCC Rcd 2631 (1988) ("*ESP Exemption Order*") at ¶¶ 13, 19.

[8] *Local Competition Order* at ¶ 1036.